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In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEES SUGGESTING WANT OF JURISDICTION OR DELAY REQUIRING DISMISSAL

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Comes now the Solicitor General on behalf of Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Flemming, appellees in the above-entitled cause, and suggests to the Court that it may be without jurisdiction to entertain the appeal or that dismissal of the appeal may be appropriate because of delay in docketing.

STATEMENT

1. This action was commenced in the District Court of the United States for the District of

Columbia by the United Federal Workers of America (C. I. O.), et al., appellants, against Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, appellees, to enjoin the appellees from enforcing the provision of Section 9 (a) of the Act of August 2, 1939, 18 U. S. C. § 61h (a), which forbids officers and employees in the executive branch of the Federal Government to take any active part in political management or political campaigns.

2. A three-judge court, consisting of D. Lawrence Groner, Chief Justice of the United States Court of Appeals of the District of Columbia, and Jennings Bailey and James W. Morris, Associate Justices of the District Court, was duly convened on May 8, 1944, pursuant to § 3 of the Act of August 24, 1937, 28 U. S. C. § 380a; and on September 26, 1944, it entered its judgment, dismissing the complaint and granting summary judgment to the appellees.

3. On October 26, 1944, an order allowing appeal from the judgment of September 26, 1944, was entered by Chief Justice Groner, the presiding judge of the three-judge court. On December 16, 1944, Chief Justice Groner signed a citation, returnable within 40 days from its date, and, on December 21, 1944, an order extending the time for docketing the record in this appeal to and including January 15, 1945.

4. No other orders were entered further extending the time within which to docket the case.

5. On February 2, 1945, the appellants filed the record and docketed the case in this Court.

APPLICABLE STATUTE AND RULES

This action was commenced under and the appeal taken pursuant to § 3 of the Act of August 24, 1937, 28 U. S. C. § 380a, which provides:

> * * * An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment * * *. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. * * *

Rule 72 of the Federal Rules of Civil Procedure provides that in such an appeal the record shall be "made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 47 of this Court, governing appeals to this Court under the Act of August 24, 1937, provides that such appeals "shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States * * *. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

THE PROBLEM PRESENTED

The statute, *supra*, provides in succeeding sentences that an appeal may be taken within 30 days after the entry of the order, decree or judgment and that the appeal shall be docketed within sixty days from the time the appeal is allowed, without any provision for the extension of either period. It appears from the face of the Act that its purpose is to assure notice to the United States of proceedings in which the constitutionality of an act of Congress is called in question and to provide expeditious procedure for disposing of such cases. See S. Rep. 963, at p. 3, and H. Rep. 1490, at p. 6, 75th Cong., 1st sess. In view of well-understood law with regard to the filing of petitions for certiorari and applications for appeal, it can scarcely be doubted that observance of the thirty-day time limit upon taking the appeal is jurisdictional under the present statute. It would not be unreasonable to conclude, therefore, that, pursuant to the statutory purpose to secure expedition, compliance with the provision for prompt docketing of appeals was also intended to be a condition of this Court's power to entertain the appellate proceedings; but, in the light of past practice, this is perhaps not a necessary conclusion.

The practice in docketing other appeals is governed by Rule 11 of this Court, which provides for the discretionary allowance of extensions of

time. Under the ordinary procedure the failure of an appellant to docket his appeal by the return day, whether as originally specified or as extended, does not deprive this Court of jurisdiction to entertain the appeal in case it is subsequently docketed. The appeal is, however, subject to a motion to docket and dismiss at any time after the return date and before actual docketing. See Robertson, *Practice and Procedure in the Supreme Court of the United States* (Revised Edition, 1929), pp. 152–155; 10 *Cyclopedia of Federal Procedure* (2d ed., 1943) 681–682. It was a recognized rule, at least until the shortening of the time for applying for appeals by Section 6 of the Act of September 6, 1916,[1] that, whether or not the procedural defect was jurisdictional, the Court would not entertain an appeal which was docketed after the term of Court next succeeding the allowance of the appeal. *Hill* v. *Chicago & Evanston R. Co.*, 129 U. S. 170, 174; *Grigsby* v. *Purcell*, 99 U. S. 505; 10 *Cyclopedia of Federal Procedure, supra*, 684, n. 91. There is no evidence in the legislative history of the Act of 1937, here involved, as to whether or not the past appellate practice was in the minds of the framers of the Act. The question of statutory interpretation may perhaps be stated as whether the provision of the Act that the docketing shall be "under such rules as may be prescribed by

[1] 39 Stat. 726, 727.

the proper courts" was intended to qualify the apparently rigid time limit upon the docketing which the statute contains. The applicable Rule of this Court (Rule 47) does not provide for extending the time for docketing as does Rule 11.

CONCLUSION

The appellees do not represent that the public interest requires in this case that the appeal be dismissed because of failure to docket the appeal within the statutory period. On the other hand they are not advised that any mitigating circumstances excuse the failure of compliance with the statutory requirement. Cf. *R. F. C.* v. *Prudence Group,* 311 U. S. 579. It is important to the parties that the rather elaborate argument which will be required if the merits are to be presented to the Court be not undertaken unless the issue which is involved can actually be determined in this case. For these reasons, the Court is respectfully requested to rule upon the question of its jurisdiction and upon the right of the appellants to prosecute their appeal in the face of noncompliance with the statute.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1945.

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